Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971.

No. 120. 71-120

EUGENE SAMMON,

Respondent,

v.

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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No. 120.

EUGENE SAMMON,

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CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Eugene Sammon, respectfully prays that Petitioner's application for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Second Circuit, entered on April 26, 1971 be denied.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Southern District of New York is reported at 305 F. Supp. 1071 (S. D. N. Y. 1969), and is reproduced in the Petition, pages 9-12. The opinion of the Court of Appeals is not yet reported, but is set forth in the Petition, pages 13-16.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition at page 2.

QUESTIONS PRESENTED.

1. Where the uncontradicted evidence showed that prior to employment aboard a vessel, a merchant seaman had been certified fit for duty by the United States Public Health Service Hospital and honestly believed himself to be fully able to work; and that thereafter the seaman worked aboard the vessel without difficulty for three and a half months, after which period he became disabled by reason of a wart on his foot; may a shipowner deny maintenance and cure benefits to him on the ground that during his pre-employment physical examination he had not disclosed his previous treatment for a previous wart?

2. Where a shipowner refused to respond to repeated requests for payment of maintenance and cure benefits, thereby forcing a seaman to retain counsel and bring suit for the maintenance and cure due him, was not the Court of Appeals correct in ruling that he was entitled to recover interest, costs, and counsel fees in addition to the maintenance that was due?

STATUTES INVOLVED.

The statutes involved are set forth in the Petition at page 3.

COUNTER STATEMENT OF THE CASE.

On October 9, 1964, respondent, a merchant seaman, was referred by his union for employment aboard petitioner's vessel, the S. S. "Green Port" (A-14).* Prior to joining the vessel he underwent a pre-employment physical examination by the petitioner's doctor (A-14-18, 46). This physician inquired of respondent whether he had had any prior accident, injury or illness (A-46-47). Respondent replied that he had had tuberculosis in 1950 (A-47). A chest x-ray was taken and the doctor rejected respondent for employment on the ground of suspected tuberculosis (A-70). Pursuant to the provisions of his union collective bargaining agreement, respondent immediately went to a United States Public Health Service facility to be examined with respect to his fitness for duty.[1] The Public Health Service physician after examination certified respondent as being fit for duty following which he was accepted for employment by petitioner (A-14).

Respondent joined the "Green Port" immediately on October 9, 1964 and worked without difficulty for three and a half months to January 29, 1965 (A-14, 18). Near the end of the second voyage he began having difficulty with a plantar wart on his right foot (A-18). He, therefore, obtained a master's certificate enabling him to receive medical treatment ashore through the United States Public Health Service Hospital at Staten Island, New York, where he was treated on an outpatient basis from February 3, 1965 until

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* All page references are to the Joint Appendix on Appeal to the United States Court of Appeals for the Second Circuit unless otherwise indicated.

1. The collective bargaining agreement between the National Maritime Union and the petitioner provided that in a case of a dispute over a seaman's fitness for duty, the seaman may be examined by the U. S. Public Health Service whose decision on fitness for duty shall be final and binding.

August 9, 1965 (A-20-22). While under treatment at the Staten Island Hospital, respondent was issued unfit for duty status certificates by the hospital. He submitted these unfit for duty certificates to petitioner's New York agent and requested the payment of maintenance and cure benefits (A-22-23). Despite these numerous requests, petitioner not only refused to pay the maintenance, but even neglected to make any response to his requests (A-23). The fact of the matter is that petitioner never gave any reason to respondent for its refusal to pay the maintenance due him.

Confronted with this refusal to pay maintenance, respondent was forced to retain counsel and institute suit to recover the maintenance due him. Even then the petitioner made no effort to explain its failure to pay maintenance. When the case was finally reached for trial, petitioner's counsel took the position, after discovery, that the refusal to pay maintenance was based upon respondent's failure to advise the physician at the pre-employment examination of his prior treatment for a wart on the sole of his right foot. It was never denied that respondent had been treated for a wart on his right foot (A-23-30, 31-35). However, respondent testified and the medical records confirmed that he had been declared fit for duty for several months prior to his employment on petitioner's vessel and had been completely asymptomatic since his discharge from the hospital (A-23, 28).[2]

Respondent testified at the trial that at the time he joined the "Green Port" he believed himself to be fit for duty and fully able to perform his work (A-30). This testimony was uncontradicted. The District Court made no finding that respondent either intentionally or fraudulently concealed the fact that he had had a wart prior to

2. Even if petitioner had rejected respondent because of the prior wart, respondent would nevertheless have had to be employed because of his fit for duty certificate from the Public Health Service.

his service on the vessel. Nor did the District Court find that respondent was in fact not fit for duty or that respondent had reason to believe that he was not fit for duty at the time he accepted employment. However, notwithstanding the absence of such findings, the District Court held that maintenance was not payable, solely because respondent had not revealed his prior treatment for the wart (Petition, pp. 15-16).

On appeal, the Court of Appeals for the Second Circuit reversed. The Court, following its prior decision in *Ahmed v. United States*, 177 F. 2d 898 (2nd Cir. 1949), held that only a "fraudulent concealment" would deprive a seaman of his right to receive maintenance and cure benefits and that ". . . the concealment of a previous condition is fraudulent *only if the seaman knows or reasonably should know that the concealed condition is relevant* . . ." (Emphasis supplied) (Petition, page 11). The Court also found that there was ". . . no evidence whatsoever that the plaintiff deliberately suppressed anything that he knew to be relevant." The Court of Appeals, therefore, remanded the case to the District Court with instructions to determine the amount to be awarded for maintenance and cure, plus interest, costs, and counsel fees (Petition, page 11).

REASONS WHY A WRIT SHOULD BE DENIED.

I. The Decision Below, Which Involves a Clearly Settled Principle, Is Supported by the Decisions of the Supreme Court in Calmar Steamship Corp. v. Taylor, 303 U. S. 525; Aguilar v. Standard Oil Co., 318 U. S. 724; and Farrell v. U. S., 336 U. S. 511 and by the Decisions of Courts of Appeals.

This Court has consistently recognized, confirmed and applied "the ancient duty of a vessel and her owner to provide maintenance and cure for seamen injured or falling ill while in service" of the vessel. *Calmar Steamship Corporation v. Taylor*, 303 U. S. 525, 527, 82 L. ed. 993, 996 (1938).[3] In *Calmar*, this Court emphasized that this obligation "arises from the contract of employment . . . ; does not rest upon negligence or culpability on the part of the owner or master, . . . nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness." U. S. at 527, L. ed. at 996. Mr. Justice Stone, explaining the strong policy considerations behind maintenance and cure, reiterated the reasons underlying the rule as enumerated by Mr. Justice Story, in *Harden v. Gordon*, 11 Fed. Cas. 480, Case No. 6,047 (C. C. D. Mass., 1823), demonstrating its humanitarian and economic importance

3. After early recognition by Justice Story in *Harden v. Gordon*, 11 Fed. Cas. 480, Case No. 6,047 (C. C. D. Mass. 1823), and in *Reed v. Canfield*, 20 Fed. Cas. 426, Case No. 11,641 (C. C. D. Mass. 1832), this Court specifically confirmed the importance of maintenance and cure in American maritime law in *The Osceola*, 189 U. S. 158, 175, 47 L. ed. 760, 764 (1903); and has since emphasized the strong humanitarian and economic policy which it implements. *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 62 L. ed. 1171 (1917); *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 73 L. ed. 220 (1928); *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 371, 77 L. ed. 368, 371 (1932).

to the seaman and the shipowner, as well as its essential position in the commercial and defense interests of this nation, U. S. at 528, L. ed. at 997, and emphasized "the liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards", U. S. at 529, L. ed. at 997.

Consequent upon these considerations, this Court has held that neither negligence on the part of the seamen nor other acts not amounting to gross misconduct will relieve the shipowner of his duty to supply maintenance and cure. *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 730-31, 87 L. ed. 1107, 1113 (1943). So absolute and all pervading is the obligation to provide maintenance that the seaman's right to maintenance can be forfeited only when his injury or disability results from his own "wilful misbehavior". In *Farrell v. U. S.*, 336 U. S. 511, 516, 93 L. ed. 850, 854 (1949), this Court said that "it has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations . . ."; that "it has few exceptions or conditions to stir contentions, cause delays, and invite litigations . . ;" that "the seaman could forfeit the right only by conduct whose wrongful quality even simple men of the calling would recognize—insubordination, disobedience to orders, and gross misconduct."

In *Ahmed v. United States*, 177 F. 2d 898 (2d Cir., 1949), the Second Circuit, in line with the foregoing precedents, and reflecting this Court's distaste for technical defenses asserted against maintenance claims, strongly rejected a shipowner's argument that a seaman who failed to call a quiescent tubercular condition to the attention of the company doctor at a pre-employment physical examination thereby forfeited his right to maintenance when this condition became aggravated during his subsequent serv-

ice aboard the vessel. Judge Swan, noting the absence of authority for such a proposition, said (900):

> ". . . On the contrary, long ago it was held that a seaman who believes himself fit for duty and signs on without any fraudulent concealment, is entitled to maintenance and cure, notwithstanding a previous condition of ill health. Neilson v. The Laura, 17 Fed. Cas. page 1305, No. 10,092 . . ."

Further, referring to the fact that the shipowner there had taken its own medical examination of the seaman before signing him on, as happened in the instant case, the Court continued (900):

> ". . . When a shipowner undertakes by a physician's examination to satisfy himself as to the fitness of a prospective member of the crew, we think that such examination should be proof of the seaman's condition unless he conceals something which he knows to be relevant or which he can reasonably be charged with so knowing. . . ."

In the above case, Judge Swan cited the decision of the Third Circuit in *Lindquist v. Dilkes*, 127 F. 2d 21 (1942), where the seaman failed to disclose at the time of signing on that he then had a prostate-enlargement of long duration, which caused pain and discomfort but did not interfere with his job. The condition became progressively worse, so that he soon became unable to work, and eventually required surgery. In affirming the award of maintenance and cure to the seaman, the Court of Appeals for the Third Circuit agreed with the conclusion that the seaman's failure to disclose a previous condition, even if still existing at the time he signed on, did not bar his maintenance claim, if

there was nothing to indicate to the seaman that he had a condition that might become disabling.

Petitioner relies exclusively on the case of *McCorpen v. Central Gulf Steamship Corp.*, 396 F. 2d 547 (5th Cir., 1968), but an examination of that case reveals that petitioner's reliance on that case is clearly misplaced. In *McCorpen,* the seaman had a thirteen year history of diabetes which, at the time he signed on, required daily insulin shots and strict dietary control. The Fifth Circuit felt that these were *material* medical facts, which should have been disclosed when examined by the shipowner's physician. In expressing the principle thus involved, the Fifth Circuit specifically cited the Second Circuit's *Ahmed* case as a basis therefor (549). The point emphasized by the Court was that the seaman had been guilty of "the kind of intentional concealment of a disabling illness" that bars maintenance (549). This was not a departure from, but an application of, the principle expressed by the Second Circuit.[4]

The factual situation in *McCorpen* is substantially different from failure to state the existence of a wart which had disappeared as in the instant case. Here, respondent had a wart on the sole of his right foot which, while it previously required medical attention, had disappeared. At the time respondent signed on petitioner's vessel, he had had no difficulty whatsoever for the three preceding months, was not under a doctor's care, and was not required to follow any daily regimen. The Second Circuit held that "the

4. The dissent by Judge Rives makes it clear that the issue here was not one of legal principle, but of factual evaluation. He said that "I do not think that the evidence supports a finding that *McCorpen* intentionally concealed a disabling illness." (551). His disagreement with the majority was as to the evaluation of the evidence. There was no dispute as to the principle to be applied, as there is no dispute between the majority and the Second Circuit.

record here contains no evidence whatsoever that the plaintiff deliberately suppressed anything which he knew to be relevant." These essential factual distinctions between the two cases demonstrate an agreement between the Circuits in legal principle, and its application to two different factual situations.

In an effort to distinguish *Ahmed,* petitioner here argues that that decision turned upon the seaman's inability to understand English. However, *Ahmed* has never been so limited, nor so narrowly applied. Indeed, in *Rosenquist v. Isthmian S. S. Co.*, 205 F. 2d 486, 489 (2 Cir. 1953), the same Court, in an opinion by the same Judge, applied *Ahmed* as it did in this case, without any reference to language difficulty. Similarly, in the Third Circuit, in *Newton v. Gulf Oil Corp.*, 180 F. 2d 491, 493, and n. 3 (3 Cir., 1950) Judge Goodrich cited *Ahmed* for its broad and liberal principle as example of the proposition that ". . . the protection of the seaman as a ward of the admiralty is by no means an obsolete concept in the law. . . ." In *Couts v. Erickson,* 241 F. 2d 499, 502 (5 Cir., 1957), the Fifth Circuit similarly cites *Ahmed,* for its broad statement on "purposeful, conscious concealment." In *Burkert v. Weyerhaeuser S. S. Co.,* 350 F. 2d 826, 829-30 (9 Cir., 1965), the Ninth Circuit cited *Ahmed* as support for the broad proposition that a seaman having "a good faith belief that he is reasonably fit for duty . . . is entitled to maintenance and cure and is not precluded from relief for failing to voluntarily disclose any illness or disease, whether existing or pre-existing."[5] Similarly, *Gypsum Carrier, Inc. v. Handelsman,* 307 F. 2d 525, 531 (9 Cir., 1962); *Dragick v. Strika,* 309 F. 2d 161, 163 (9 Cir., 1962).[6]

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5. The Ninth Circuit Court discussed and quoted from *Ahmed* at length (p. 830) without reference to language difficulty.

6. As to the principle, see also *Sobosle v. United States Steel Corp.*, 359 F. 2d 7 (3rd Cir., 1966), and *Gore v. Clearwater Shipping Corp.*, 378 F. 2d 584 (3rd Cir., 1967).

The facts in this case clearly fall within the rule expressed by this Court and as applied in *Ahmed*. The argument raised here by petitioner is the same as was rejected in *Ahmed:* that the seaman has a duty to disclose a prior condition, despite the fact that it is quiescent and without symptoms and does not disable him from performing his duties. Respondent had been certified by the U. S. Public Health Service as "fit for duty", with reference to his prior wart. It is uncontradicted that at the time he joined the petitioner's vessel he honestly believed himself fully able to work, a belief borne out by the fact that he had worked without difficulty for three and a half months thereafter.

Further, it must be noted that even if respondent had been rejected by the company for employment because of the prior existence of a wart, the seaman had the right to appeal to the U. S. Public Health Service. That service had found him fit for duty as to the prior wart, and such finding would have been final and binding, and the company would have had to accept him for employment despite any attempt to reject him.

Under these circumstances, respondent's failure to disclose the fact that he had previously had a wart on his foot cannot be considered an act of "fraud" or "wilful misconduct" as would warrant denial of maintenance. Thus, the decision below is fully consistent with the broad policy considerations and applied principles announced by this Court, and with the prior decisions of the Court below in *Ahmed* and of the other Circuits. This case does not involve any "new" principle of law; rather, it represents a proper application of principles which are as old as the law of maintenance and cure itself, and which were specifically recognized in the context of pre-employment physical examinations in the *Ahmed* case.

II. The Direction to Award Counsel Fees, Interest and Costs Is in Accordance With This Court's Decision in Vaughan v. Atkinson, 369 U. S. 527, 8 L. ed. 2d 88 (1962).

In *Vaughan v. Atkinson,* 369 U. S. 527, 8 L. ed. 2d 88 (1962), this Court held that counsel fees, interest and costs may be awarded where maintenance has been wrongfully denied and the seaman was required to retain counsel and to institute suit to recover the maintenance. Notwithstanding this broad authority for awarding counsel fees, interest and costs in *Vaughan v. Atkinson, supra,* petitioner now argues that certiorari should be granted in the instant case because its refusal to pay maintenance was "not arbitrary". But, petitioner's rationale does not shield it from the policy expressed in *Vaughan.*

Petitioner argues that it had the right to rely on the Fifth Circuit's decision in *McCorpen v. Central Gulf Steamship Corp., supra,* and thereby refuse to pay maintenance. But, as we have previously demonstrated, the decision in *McCorpen* is factually distinguishable from the instant case. Moreover, petitioner could not have relied on *McCorpen* because that case was not decided until 1968, more than three years *after* petitioner refused the request for maintenance in the instant case. The only explanation for its refusal was pure recalcitrance. Further, the instant suit was instituted in the Second Circuit where *Ahmed v. United States, supra,* had been the law for over 20 years. It is, therefore, apparent that petitioner's actions were arbitrary and unjustified.

In *Vaughan,* this Court reiterated the oft-stated principles that the duty to provide maintenance and cure must be interpreted liberally "for the benefit and protection of seamen who are its wards"; that the shipowner's liability for maintenance and cure was among "the most pervasive"

of all, and "was not to be defeated by restrictive distinctions" nor "narrowly confined"; that "when there are ambiguities or doubts, they are resolved in favor of the seaman." (U. S. at 532-33, L. ed. at 92).

Under the principles expressed by this Court, the Court below did properly award counsel fees, interest and costs.

CONCLUSION.

For the above foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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